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20 **UNITED STATES DISTRICT COURT**
21 **CENTRAL DISTRICT OF CALIFORNIA**

22 OULA ZAKARIA, individually and as
23 a representative of the class,

24 Plaintiff,

25 vs.

26 GERBER PRODUCTS CO., a
27 corporation, d/b/a NESTLE
28 NUTRITION, NESTLE INFANT
NUTRITION, AND NESTLE
NUTRITION NORTH AMERICA,

Defendant.

Case No. 2:15-cv-0200-JAK (Ex)

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

Date: June 15, 2015

Time: 8:30 a.m.

Courtroom: 750

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2 109 Cal. App. 4th 1162 (2003)23

3 *Yumul v. Smart Balance, Inc.*
4 773 F. Supp. 2d 1117 (C.D. Cal. 2010)16

1 **I. INTRODUCTION**

2 This class action arises from a fraudulent and deceptive marketing scheme by
3 defendant Gerber Products Company (“Gerber”) to dupe concerned parents into
4 purchasing an infant formula that Gerber falsely claimed reduced allergies in
5 newborns despite a body of scientific evidence to the contrary. Gerber’s motion to
6 dismiss misconstrues, ignores and distorts much of the Amended Complaint, and
7 overlooks well-settled rules and precedent relating to these claims. Courts have
8 rejected the same arguments that Gerber makes here. The motion even includes a
9 canned argument that Plaintiff is not entitled to injunctive relief, though the
10 Amended Complaint seeks no such relief. The Court should deny the motion.

11 **II. FACTUAL ALLEGATIONS**

12 Gerber manufactures, markets, and sells infant food and other infant-related
13 products in California and throughout the country. Amended Complaint at ¶¶ 14, 16,
14 17, 19.¹ One of those products is Good Start Gentle, an infant formula made from
15 partially hydrolyzed whey protein. ¶¶ 14, 19, 20. In a calculated effort to set Good
16 Start Gentle apart from competitor infant formulas and substantially increase its
17 revenues, Gerber falsely advertised Good Start Gentle as the first and only infant
18 formula endorsed by the FDA to reduce the occurrence of allergies in infants. ¶¶ 3, 7
19 25-27, 30-33, 36-51, 55-56.

20 However, scientific evidence proves that ingesting partially hydrolyzed whey
21 protein does not reduce the risk of infants of developing allergies. ¶¶ 26, 36-42, 44,
22 46, 47. In 2006, after reviewing thirty-six studies, the Food and Drug Administration
23 (“FDA”) concluded that there was “no credible evidence to support the qualified
24 health claim relating consumption of 100 percent partially hydrolyzed whey protein .
25 . . to a reduced risk of food allergy.” ¶ 26. Other scientific research proves that
26 ingesting partially hydrolyzed whey protein does not reduce the risk of
27 manifestations of allergic disease in children from birth to age seven, nor does it
28

¹ Citations to paragraphs in the Amended Complaint are referred to as “¶__”.

1 “support the recommendation that [partially hydrolyzed whey formula] . . . be used
 2 after breast-feeding as a preventative strategy for infants at high risk of allergic
 3 diseases.” ¶¶ 36-41 (citing Exhibit A, the “Lowe Study”). Gerber knew partially
 4 hydrolyzed whey protein did not prevent allergies because Gerber’s affiliate funded
 5 (and later defunded) the Lowe Study, and its Director of Regulatory Issues, Melanie
 6 Fairchild-Dzanis, received an FDA letter stating that no evidence existed supporting
 7 Gerber’s claim about the product preventing allergies. ¶¶ 28, 41.

8 Even though it possessed this knowledge, beginning in 2011 Gerber widely
 9 marketed Good Start Gentle as a means to prevent developing all allergies in infants.
 10 ¶¶ 7, 44, 46, 47. For instance, it attached golden labels to Good Start Gentle
 11 containers that stated, in bold lettering, that the product was the “1st and Only
 12 Routine Formula to Reduce the Risk of Developing Allergies,” and it disseminated
 13 print and television advertisements representing that Good Start Gentle prevented
 14 infants from inheriting their mother’s allergies. ¶ 44, 46, 47.

15 Gerber also deceptively advertised that partially hydrolyzed whey protein
 16 “helps reduce the risk of developing atopic dermatitis,” a common skin disease
 17 known as eczema. ¶¶ 3, 45, 48, 50. And it did so when scientific research funded by
 18 Gerber’s affiliate proved this assertion to be false. ¶¶ 36-41 (After testing 575
 19 infants up to the age of two in a single-blind study, the Lowe Study confirmed that
 20 “Neither [partially hydrolyzed whey protein] formula nor the soy formula reduced
 21 the risk of allergic manifestations in the first 2 years of life.”). Moreover, when
 22 Gerber referred to atopic dermatitis in its marketing campaign for Good Start Gentle,
 23 it failed to include the stringent qualifying language the FDA required concerning
 24 the dearth of science supporting Gerber’s health claim.² ¶¶ 30-35, 45, 50 (The 2011
 25

26
 27 ² It is important to note that the FDA did not review the Lowe Study when issuing its Letter of
 28 Enforcement Discretion to Defendant in May 2011. ¶¶ 30, 31, 35 (The Lowe study was published
 in June 2011, one month after the FDA issued its letter on May 24, 2011). It is thus unclear if the
 FDA would have exercised enforcement discretion regarding any atopic dermatitis claim, no
 matter how narrow, if the Lowe Study were included in its analysis.

1 Enforcement Discretion Letter required language stating that “little” or “very little”
2 evidence supported the claim depending on the infant age.”).

3 Gerber falsely advertised that the FDA endorsed Good Start Gentle as a
4 means to prevent allergies generally and atopic dermatitis in particular when, in
5 reality, the FDA only stated that Gerber could make a very narrow set of health
6 claims relating to atopic dermatitis provided Gerber also include strict qualifying
7 statements. ¶¶ 3, 6, 25-28, 30-34, 45, 48, 49.

8 Gerber misleadingly used the FDA term of art “Qualified Health Claim” to
9 misrepresent that Good Start Gentle was fit for a particular purpose or job, when, in
10 actuality, the term “Qualified Health Claim” means that the FDA did not grant
11 approval for use of an unqualified health claim and that the scientific support for the
12 claim is limited or lacking. ¶¶ 3, 45, 48, 49. Gerber misleadingly used the “Qualified
13 Health Claim” to increase sales by grossly mischaracterizing the nature of the FDA
14 health claim approval process and the quality and the traits possessed by Good Start
15 Gentle. ¶¶ 3, 7, 45, 48, 49, 50, 92, 110.

16 The Amended Complaint details Gerber’s false representations and alleges
17 that Gerber began its misleading advertising campaign in at least 2011 and continues
18 to do so today. ¶¶ 7, 42-51, 53-58. The Amended Complaint points to the “1st and
19 Only Label” being placed on containers as late as November 2013, and specifically
20 identifies the dates of other misleading marketing materials as well. ¶¶ 63, 46
21 (storyboard of television advertisement dated April 9, 2012 stating that Good Start
22 Gentle prevented infants from inheriting their mother’s allergies); ¶ 50 (People
23 Magazine advertisement stating “1st Formula With FDA Qualified Health Claim” in
24 prominent seal dated August 15, 2013).

25 Gerber widely disseminated Good Start Gentle’s false advertising and
26 promotional materials across the United States, including in California, through
27 television commercials, nationwide print advertisements, point-of-sale displays,
28 product packaging, and on the internet. ¶¶ 14, 16, 19, 42-50, 61-65.

1 The Amended Complaint provides seven examples of promotional materials
 2 that were materially misleading. ¶¶ 42-52. Some falsely communicate that Good
 3 Start Gentle prevented infants from developing all allergies – a claim soundly
 4 rejected by scientific research – while others communicate that Good Start Gentle
 5 prevented atopic dermatitis – a claim also disproven by scientific research. ¶¶ 36-41,
 6 44-48. Furthermore, Gerber repeatedly stated that the FDA endorsed or “qualified”
 7 Good Start Gentle for a particular purpose or quality, when, in reality, the FDA did
 8 no such thing. ¶¶ 3, 7, 45, 48, 49, 50, 92. Gerber made these misrepresentations to
 9 induce Plaintiff and other members of the consuming public to purchase Good Start
 10 Gentle. ¶¶ 7, 42, 52, 62-63, 89, 101, 111.

11 In October 2013, a pediatrician introduced Plaintiff to Good Start Gentle. ¶
 12 60. Plaintiff then conducted her own internet research and relied upon Gerber’s
 13 misrepresentations that Good Start Gentle prevented allergies in infants and that the
 14 FDA endorsed or “qualified” the product for this attribute. ¶ 61. This understanding
 15 was further reinforced by the “1st & Only Routine Formula to Reduce the Risk of
 16 Developing Allergies” label, a representation Plaintiff relied upon to purchase Good
 17 Start Gentle in November 2013. ¶¶ 62-63. Plaintiff regularly purchased Good Start
 18 Gentle based on Gerber’s false claims from October 2013 until November 2014. ¶¶
 19 65-67. If Plaintiff had not been exposed to Gerber’s misrepresentations, she would
 20 have purchased cheaper competitor infant formula, paid less than what she did for
 21 overpriced Good Start Gentle, or she would not have purchased the product at all. ¶¶
 22 68, 69, 91, 102.

23 **III. STANDARD OF REVIEW**

24 A Rule 12(b)(6) motion to dismiss should be denied where a complaint states a
 25 claim for relief “plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
 26 570 (2007). In considering a motion to dismiss, the Court “must accept all factual
 27 allegations in the complaint as true and construe the pleadings in the light most
 28 favorable to the nonmoving party.” *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d

1 1152, 1159 (9th Cir. 2012) “Dismissal under 12(b)(6) is appropriate only where the
 2 complaint lacks a cognizable legal theory or sufficient facts to support a cognizable
 3 legal theory.” *Mendiondo v. Centinela Hosp. Medical Center*, 521 F.3d 1097, 1104
 4 (9th Cir. 2008). Here, Plaintiff plausibly alleges all her claims for relief, and as result,
 5 the Court should deny Gerber’s Motion to Dismiss.³

6 **IV. LEGAL ARGUMENT**

7 **A. THE PRIMARY JURISDICTION DOCTRINE HAS NO APPLICATION** 8 **IN A CONSUMER CLASS ACTION BASED ON DECEPTIVE AND** 9 **MISLEADING MARKETING**

10 Courts have emphasized that primary jurisdiction “applies in a limited set of
 11 circumstances” and “is not designed to ‘secure expert advice’ from agencies ‘every
 12 time a court is presented with an issue conceivably within the agency’s ambit.’”
 13 *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). “Instead, it is to
 14 be used only if a claim ‘requires resolution of an issue of first impression, or of a
 15 particularly complicated issue that Congress has committed to a regulatory agency.’”
 16 *Id.* at 1114; *National Communications Assn., Inc. v. AT&T*, 46 F.3d 220, 222-223
 17 (2nd Cir. 1995) (“The doctrine of primary jurisdiction allows a federal court to refer
 18 a matter extending beyond the ‘conventional experiences of judges’ or ‘falling
 19 within the realm of administrative discretion’ to an administrative agency with more
 20 specialized experience, expertise, and insight.”)

22 Courts have consistently rejected the same arguments that Gerber makes here
 23 about primary jurisdiction and have refused to invoke primary jurisdiction in
 24 consumer class actions alleging deceptive and misleading marketing. For instance, in
 25 *Bruton v. Gerber Products Company*, 961 F. Supp. 2d. 1062 (N.D. Cal. 2013), the
 26

27
 28 ³If the Court dismisses any portion of the Amended Complaint, Plaintiff requests leave to amend.
DeSoto v. Yellow Freight Sys., 957 F.2d 655, 658 (9th Cir. 1992) (leave to amend is only properly
 denied “where the amendment would be futile”).

1 plaintiff brought an action under the UCL, FAL and CLRA alleging that several of
 2 Gerber's products contained deceptive and misleading labels relating to nutrient and
 3 sugar content, as well as by representing that the products were "made with 100%
 4 natural ingredients." *Id.* at 1071-73. As it does here, Gerber argued that the primary
 5 jurisdiction doctrine should bar plaintiff's suit. The Court disagreed:

6 Defendants urge that, in this case, the "FDA has
 7 'regulatory authority pursuant to a statute that subjects an
 8 industry to comprehensive regulatory authority,' and
 9 resolving the issue 'requires expertise or uniformity in
 10 administration.' The Court is not persuaded. While this
 11 case does involve issues within the jurisdiction of the
 12 FDA, *the Ninth Circuit has made clear that only those*
 13 *claims raising issues of first impression or particular*
 14 *complexity are appropriately dismissed or stayed based*
 15 *on primary jurisdiction.*

16 *Id.* at 1085, emphasis added; *Lockwood v. ConAgra Foods, Inc.*, 597 F. Supp. 2d
 17 1028 (N.D. Cal 2009) (the primary jurisdiction doctrine "is a 'prudential one,' under
 18 which a court determines that an otherwise cognizable claim implicates technical
 19 and policy questions that should be addressed in the first instance by the agency with
 20 regulatory authority over the relevant industry . . .").

21 Similarly, in *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1124
 22 (N.D. Cal. 2010), plaintiffs filed a consumer class action under the UCL, FAL, and
 23 CLRA alleging that defendant's granola bars contained misleading representations
 24 regarding the amount of trans fat. Defendant asked the Court to apply the primary
 25 jurisdiction doctrine. The Court declined, reasoning that "plaintiffs advance a
 26 relatively straightforward claim: they assert that defendant has violated FDA
 27 regulations and marketed a product that could mislead a reasonable consumer" and
 28

1 that the issues raised in the case “do not entail technical questions or require agency
 2 expertise.” *Id.* at 1124; *Reid v. Johnson & Johnson*, 780 F. 3d 952, 967 (9th Cir.
 3 2015) (rejecting primary jurisdiction argument and stating that the “the case
 4 ultimately turns on . . . whether a reasonable consumer would be misled by
 5 [Defendant’s] marketing, which the district courts have reasonably concluded they
 6 are competent to address in similar cases.”); *Chavez v. Blue Sky Natural Beverage*
 7 *Co.*, 268 F.R.D. 365, 374-375 (N.D. Cal. 2010) (primary jurisdiction doctrine did
 8 not apply to a deceptive labeling claim since “plaintiff’s state law claims do not
 9 require an FDA ruling as to whether the [Food, Drug, and Cosmetic Act] ha[s] been
 10 violated, nor does adjudication of those claims require the FDA’s particular
 11 expertise or uniformity in administration of labeling requirements.”); *In re 5-hour*
 12 *ENERGY Marketing and Sales Practices Litigation* 13-2438 (Dkt. 51), 2014 WL
 13 5311272, at *15 (C.D. Cal. Sept. 4, 2014) (“Plaintiff’s allegations of deceptive
 14 labeling do not require the expertise of the FDA to be resolved in the courts, as
 15 every day courts decide whether conduct is misleading [T]he mere existence of
 16 an agency investigation does not weigh in favor of a referral under the primary
 17 jurisdiction doctrine.”) (internal quotation marks omitted).

19 Ignoring the overwhelming authority against it, Gerber relies on two cases
 20 that are both distinguishable. Def. Memo. at 12-13. In the first, *Mutual Pharm. Co.*
 21 *v. Watson Pharm., Inc.*, 09-5700 (Dkt. 139), 2009 WL 3401117 (C.D. Cal. Oct. 19,
 22 2009), the plaintiffs sought a preliminary injunction against a rival drug company
 23 alleging that it infringed on a “three-year exclusivity period granted by the FDA.”
 24 *Id.* at *1. The Court did not decide whether or not the doctrine of primary
 25 jurisdiction applied but instead denied a preliminary injunction because “Plaintiffs
 26 [had] not established a likelihood of success on the merits.” *Id.* at *4, 9 (also
 27 transferring the case). After the case was transferred, the District of New Jersey
 28 denied defendants’ motion to dismiss and rejected their primary jurisdiction

1 argument. *Mutual Pharm. Co. v. Watson Pharm., Inc.*, 09-cv-5421 (Dkt. 209), at 3
 2 (D.N.J. Feb. 8, 2010). Here, like the court in *Mutual Pharm. Co.*, this Court should
 3 reject Gerber's primary jurisdiction argument.

4 The other case, *Gordon v. Church & Dwight Co.*, 09-cv-5585 (Dkt. 40), 2010
 5 WL 1341184 (N.D.Cal. April 2, 2010), involved the complex issue of labeling
 6 medical devices (condoms) treated with Nonoxynol-9 ("N9"), a spermicidal
 7 lubricant. *Id.* at *1. The FDA had, up to that point, specifically regulated N9
 8 condoms for thirty years, "mandating the specific substance of warnings,
 9 instructions, and statements of use." *Id.* at 2. When the court was deciding *Gordon*,
 10 the FDA was also actively "considering public comments and other data in
 11 connection" with the labeling of N9 condoms. *Id.* *Gordon* thus presents a striking
 12 factual contrast to Plaintiff's case, where the FDA has little, if any, current
 13 involvement in regulating Gerber's conduct. *Chavez v. Nestle USA, Inc.*, 511 Fed.
 14 Appx. 607, 607 (9th Cir. 2013) ("Appellants' claims do not necessarily implicate
 15 primary jurisdiction, and the FDA has shown virtually no interest in regulating DHA
 16 in this context.").

17
 18 The two cases cited by Gerber do not change the fact that courts have
 19 previously rejected the same arguments that Gerber makes here. The primary
 20 jurisdiction doctrine does not apply to these claims or to the underlying facts.

21 **B. THE AMENDED COMPLAINT ALLEGES THAT GERBER'S**
 22 **REPRESENTATIONS ABOUT ALLERGY, ATOPIC DERMATITIS, AND**
 23 **FDA ENDORSEMENT ARE ACTUALLY FALSE AND MISLEADING,**
 24 **RATHER THAN MERELY UNSUBSTANTIATED**

25 Gerber attempts to classify Plaintiff's allegations as premised on a non-
 26 actionable "prior substantiation theory of liability." Def. Memo. at 13: 16. Gerber
 27 attempted the same "lack of substantiation" argument in another case and failed
 28 because the court found that plaintiffs sufficiently alleged Gerber's representations

1 were “affirmatively false” by citing scientific research in their complaint. *In re*
 2 *Gerber Probiotics Sales Practices Litigation*, 12-cv-00835 (Dkt. 61), 2013 WL
 3 4517994, at *8 (D.N.J. Aug. 23, 2013).

4 Like the plaintiffs in *Gerber Probiotics*, Plaintiff pleads actual falsity because
 5 she alleges that scientific research disproves Gerber’s claims about Good Start
 6 Gentle preventing allergies and atopic dermatitis. ¶¶ 26, 36-41. When assessing
 7 misrepresentations, “[t]here is a difference, intuitively, between a claim that has no
 8 evidentiary support one way or the other and a claim that’s actually been disproved.
 9 In common usage, we might say that both are ‘unsubstantiated,’ but the case law
 10 (and common sense) imply that in the context of a false advertising lawsuit an
 11 ‘unsubstantiated’ claim is only the former.” *Eckler v. Wal-Mart Stores, Inc.*, No.: 12-
 12 cv-727 (Dkt. 24), 2012 WL 5382218, at *3 (S.D. Cal. Nov. 1, 2012); *Hughes v.*
 13 *Ester C. Co.*, 930 F. Supp. 2d 439, 459-60 (E.D.N.Y. 2013) (cited study moved the
 14 plaintiff’s claims into the “affirmative misrepresentation realm.”); *Rikos v. Procter*
 15 *& Gamble Co.*, 782 F. Supp. 2d 522, 527-29 (S.D. Ohio 2011) (same).

16 In the cases Gerber cites, the plaintiffs did not allege that scientific research
 17 disproved the representations at issue. *See* Def. Memo. of Law at 13-14. Here, on the
 18 other hand, Plaintiff alleges that the comprehensive Lowe Study⁴ (attached and
 19 incorporated into the Amended Complaint) contradicts Gerber’s bogus allergy and
 20 atopic dermatitis claims. *See* Am. Compl. at ¶¶ 36-41. As the second largest study of
 21 its kind directly considering the link between infant allergies and ingesting partially
 22

23
 24 ⁴ Plaintiff should not be charged with constructive knowledge of the Lowe Study, as argued,
 25 without authority, by Gerber. Def. Memo. at 17. A court may impute knowledge to a party where
 26 publicity and information relating to an issue are generally available, but it must take into account
 27 a number of factors including the characteristics of the party, and quantity and quality of the
 28 information. *Migliori v. Boeing North America, Inc.*, 97 F. Supp. 2d 1001, 1011. Generally
 speaking, a court should not undertake such an analysis on a motion to dismiss. *Id.* at 1011-12.
 Here, there are absolutely no facts alleged in the Amended Complaint which create an inference
 that the Lowe Study was widely publicized or that Plaintiff should have been aware of it based on
 unique circumstances.

1 hydrolyzed whey protein, the Lowe Study concluded that partially hydrolyzed whey
2 protein offered no prophylactic benefit for preventing infant allergies. *Id.* On this
3 Motion to Dismiss, Plaintiff's allegations about the Lowe Study and other scientific
4 research successfully raise the inference that Gerber's health claims are actually
5 false, not just unsubstantiated. *See Gerber Probiotic*, 2013 WL 4517994, at *8 ("[I]t
6 is not appropriate to consider the content of the studies and resolve the factual issues
7 at this stage of the litigation. Indeed, in arguing that other courts have rejected
8 similar claims, Defendant relies on two cases that involved motions for summary
9 judgment [including *Stanley v. Bayer Healthcare LLC*, cited in Def. Memo. of Law
10 at 14: 9-10].")

11 Science aside, Gerber's FDA approval claims and its misleading use of the
12 FDA term of art "Qualified Health Claim" (including placing the term prominently
13 in seals and gold badges, ¶¶ 45, 49, 50) are misrepresentations of facts and
14 circumstances. The FDA unequivocally denied Gerber's general allergy prevention
15 claim in 2006 and additionally rejected Gerber's atopic dermatitis claim as proposed
16 in 2011, instead requiring that Gerber drastically modify the claim and provide strict
17 qualifying language. ¶¶ 21-35, 55-58. Despite these clear rejections and in disregard
18 of the FDA's authority, Gerber advertised that the FDA endorsed Good Start Gentle,
19 Gerber did not include any qualifying language with its atopic dermatitis claims, and
20 Gerber misrepresented the FDA health claim process through the misleading use of
21 the word "qualified." *Id.* at 42-52. These practices, along with Gerber's false allergy
22 claims, constitute misleading and false advertising. As a result, the Amended
23 Complaint should not be dismissed for pleading a mere "lack of substantiation," as
24 Gerber contends. *See Cardenas v. NBTY, Inc.*, 870 F. Supp. 2d 984, 995 (E.D. Cal.
25 2012) ("Plaintiff's cause and effect studies are sufficiently specific to provide
26 Defendants notice of what is allegedly false or misleading about the Osteo Bi-Flex
27 representations[.]").

28 ///

C. THE AMENDED COMPLAINT MEETS THE PARTICULARITY REQUIREMENTS OF FED. R. CIV. P. 9(B)

Under Rule 9(b), “allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny they have done anything wrong.” *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001). State of mind may be alleged generally. FED. R. CIV. P. 9(b). Moreover, in certain scenarios, including instances of corporate fraud, “the rule may be relaxed as to matters within the opposing party’s knowledge.” *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). In sum, a plaintiff must plead “‘the who, what, when, where, and how’ of the misconduct charged.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009).

In *Gerber Probiotics*, where plaintiffs challenged representations that Gerber’s products supported the digestive health of infants, the District of New Jersey found that plaintiffs pled with particularity because they “set forth the dates within which Gerber ran the advertising campaign at issue, identifie[d] the specific statements concerning the immune benefits of probiotics at issue in the campaign, attache[d] representative examples of the advertisements and labels, and state[d] the date range within which and location where these Plaintiffs purchased the products.” *In re Gerber Probiotic Sales Practice Litigation*, 12-cv-00835 (Dkt. 79), 2014 WL 1310038, at *8 (D.N.J. Mar. 31, 2014).

Here, as in *Gerber Probiotic*, Plaintiff alleges “the who, what, when, where, and how” of Gerber’s misconduct. She alleges what Gerber stated, when and where it made those statements, and provides examples of Gerber’s false marketing materials, describing in detail how each sample was misleading based on scientific research, notions common to the consuming public, and Gerber’s course of dealings with the FDA. ¶¶ 42-52. She also describes the dates and locations of her purchases. ¶¶ 60-69. Therefore, as a whole, the Amended Complaint provides Defendant with

1 enough factual detail to defend against the claims as required by Rule 9(b).

2 **D. THE AMENDED COMPLAINT ADEQUATELY ALLEGES CLAIMS**
 3 **UNDER THE UCL, FAL, AND CLRA**

4 **1. Plaintiff Challenges Gerber's Affirmative Misrepresentations, Not**
 5 **Gerber's Failure to Disclose or Concealment of Information from Consumers**

6 In order to allege a UCL, FAL, or CLRA claim, a plaintiff does not need to
 7 allege a duty to disclose as argued by Gerber. Def. Memo. at 20-21. Instead, claims
 8 under the UCL, FAL, and CLRA are governed by the "reasonable consumer"
 9 standard." *Williams v. Gerber Products, Co.*, 552 F.3d 934, 938 (9th Cir. 2008).
 10 Under this test, Plaintiff must allege "members of the public are likely to be
 11 deceived" by Gerber's business practices. *Id.* False statements can deceive the
 12 public, along with ostensibly true statements that have a "capacity, likelihood or
 13 tendency to deceive or confuse." *Id.*; *Lam v. General Mills*, 859 F. Supp. 2d 1097,
 14 1104 (N.D. Cal. 2012) ("A reasonable consumer might make certain assumptions
 15 about the type and quantity of fruit in the Fruit Snacks based on the statement "made
 16 with real fruit," along with other statements prominently featured on the products'
 17 packaging."). Plaintiff satisfies these pleading requirements. ¶¶ 92, 100, 101, 106,
 18 108, 110, 112 ("[Gerber's] misuse of FDA endorsement and FDA terms of art
 19 were/are likely to deceive reasonable consumers.")

20 Gerber appears to draw its "duty to disclose" argument and supporting
 21 authority directly from *Chavez v. Nestle USA, Inc.*, No. 11-2011 WL 2150128 (Dkt.
 22 89), at *5-7 (C.D. Cal. May 19, 2011), a case inapposite to Plaintiff's claims, and
 23 one later reversed, in part, by the Ninth Circuit.⁵ In *Chavez*, the plaintiffs expressly
 24 based their theory of liability on "two interrelated components: (1) the general
 25 allegation of Defendant's failure to have substantiation . . . and (2) the existence of a
 26 'duty to disclose' on the part of Nestle that it had no substantiation." *Id.* at *4. This

27
 28 ⁵ The Ninth Circuit held that "[t]he primary jurisdiction doctrine did not provide an alternative
 basis for dismissing Juicy Juice Brain Development claims." *Chavez v. Nestle, USA, Inc.*, 511 Fex.
 Appx. 606, 606-08 (9th Cir. 2013).

1 Court held that the plaintiffs failed to argue or allege the existence of a duty to
 2 disclose or that “Nestle actually knew of the lack of substantiation.” *Id.* at *7. Later,
 3 the Ninth Circuit reversed and remanded because it found that plaintiffs’
 4 “allegations regarding Juicy Juice Brain Development [supported] FAL and UCL
 5 fraudulent business practice claims.” *Chavez v Nestle, USA, Inc.*, 511 Fed. Appx. at
 6 606-07. The plaintiffs in *Chavez* did not bring CLRA claims. *Id.*

7 Here, unlike *Chavez*, Plaintiff bases her claims on Gerber’s knowing and
 8 affirmative misrepresentations, not a theory of “fraudulent omission or concealment”
 9 or that Gerber “had a duty to disclose that it allegedly lacked substantiation.” Def.
 10 Memo. at 20: 4, 14. In actuality, the Amended Complaint alleges a wide range of
 11 false and misleading marketing tending to deceive or confuse the public, creating an
 12 issue of fact inappropriate for dismissal as a matter of law. *See, e.g.*, ¶¶ 37 (“Several
 13 compelling scientific studies have concluded that partially hydrolyzed whey formula
 14 does not lower the risk of allergic manifestations”), 43 (“Exhibit B falsely
 15 communicates to consumers that Good Start Gentle reduced the risk of infant
 16 allergies despite . . . compelling evidence, such as the Lowe Study, contradicting the
 17 claim.”). Gerber’s duty to disclose argument makes little sense given California law
 18 and the substance of Plaintiff’s allegations.

19 **2. Plaintiff Alleges Reliance and Causation Under the UCL, FAL and CLRA**

20 Gerber misstates the requirements for reliance under California law,
 21 alternatively arguing that Plaintiff’s daughter must have manifested allergic
 22 symptoms or that Plaintiff must pinpoint the exact moment and exact
 23 misrepresentation that compelled her to buy Good Start Gentle. *See* Def. Memo. at
 24 8, 10-11, 17-19. The reliance requirements under the California statutes forming the
 25 legal basis of Plaintiff’s claims for relief are more flexible than Gerber asserts.

26 Under the UCL and the FAL, a plaintiff must have “suffered an injury in fact
 27 and . . . lost money or property as a result of the unfair competition.” CAL. BUS. &
 28

1 PROF. CODE §§ 17204, 17535. Under the fraud prong of the UCL and for FAL
 2 claims⁶ based on misrepresentations, a plaintiff must also allege “actual reliance.” *In*
 3 *re Tobacco II Cases*, 46 Cal. 4th 298, 326 (Cal. 2009); *In re Toyota Motor Corp.*,
 4 790 F. Supp. 2d 1152, 1168 (C.D. Cal. 2011). But actual reliance does not require
 5 that the misrepresentation was the “predominant” or “decisive” factor in a plaintiff’s
 6 decision to purchase the product; instead, the misrepresentation must have only been
 7 a “substantial factor” in the decision. *Tobacco II*, 46 Cal 4th at 326-27. “A
 8 presumption, or at least an inference, of reliance arises whenever there is a showing
 9 that the misrepresentation was material.”⁷ *Id.* at 327.

10 Courts have found actual reliance in cases involving claims similar to
 11 Plaintiff’s. For example, in *Bruton*, the court upheld claims under the UCL, FAL,
 12 and CLRA claims against Gerber where the plaintiff “allege[d] that she ‘read and
 13 reasonably relied on’ Defendants’ labels, ‘including labels with nutrient content
 14 claim,’ when making her decision to purchase Defendants’ products.” *Bruton v.*
 15 *Gerber*, 961 F. Supp. 2d at 1089; *Gerber Probiotics*, 2014 WL 1310038, at *6
 16 (“Causation for standing purposes is met here because Plaintiffs demonstrate that
 17 Gerber’s message was consistent across its campaign, and Plaintiffs allege that they
 18 were exposed to advertisements and product labels, and that they relied upon the
 19 category of misrepresentations at issue in purchasing the product(s)”); *Ries v.*
 20 *Arizona Beverages USA LLC*, 287 F.R.D. 523, 530-31 (N.D. Cal. 2012) (“[I]t is
 21 likewise of marginal significance that both plaintiffs have admitted multiple reasons
 22 for their purchase of Arizona products. So long as the representation that defendants’
 23

24 ⁶ Under the CLRA, consumers must allege that they suffered damages “as a result of the use or
 25 employment by any person of a method, act, or practice declared to be unlawful” pursuant to the
 26 statute. Cal. Civ. Code §§ 1770, 1780. Furthermore, a plaintiff must allege actual reliance.
 27 *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582, 586 (C.D. Cal. 2011).

28 ⁷ “A misrepresentation is judged to be ‘material’ if a reasonable man would attach importance to
 its existence or nonexistence in determining his choice in the transaction in question.” *In re*
Tobacco Cases II, 46 Cal. 4th at 327. Materiality is a question of fact, unless the “fact
 misrepresented is so obviously unimportant that the jury could not reasonably find that a
 reasonable man would have been influenced by it.” *Id.* (citation omitted).

1 products were ‘natural’ was an ‘immediate’ cause for their purchase, the reliance
 2 requirement is met.”); *Delacruz v. Cytosports*, No. 11-3532 (Dkt. 48), 2012 WL
 3 256387, at *9 (N.D. Cal June 28, 2012) (“She had plead that she ‘saw and relied’ on
 4 the alleged misrepresentations on the website in deciding to purchase the products.
 5 She also alleges that she ‘saw and relied’ on television ads.”).

6 In this case, the Amended Complaint alleges that reliance on *material*
 7 misrepresentations played a “substantial” factor in Plaintiff’s purchase of Gerber
 8 Good Start, namely reliance on Gerber’s website and the conspicuous “1st & Only
 9 Routine Formula to Reduce the Risk of Developing Allergies” label affixed to
 10 containers of Good Start Gentle. *Id.* at ¶¶ 61-63 (“Plaintiff ceased buying other
 11 infant formulas, and instead, began routinely purchasing Good Start Gentle
 12 formula.”). The fact that Plaintiff’s pediatrician may have played a small role in
 13 introducing Plaintiff to Good Start Gentle and Good Start Soothe is not fatal to her
 14 case because Gerber’s misleading practices still played a substantial, if not decisive,
 15 role in her decision to consistently purchase Good Start Gentle for over a year. *Id.* at
 16 60-69, 72, 90, 100, 144, 145, 153-55 (“Plaintiff first saw and relied on the
 17 information depicted [on the “1st & Only” label] in November 2013”). Gerber, of
 18 course, can cite no authority to the contrary, and its reliance argument is a veiled
 19 attempt to prematurely raise factual issues on a motion to dismiss.

20 Gerber also asserts that Good Start Gentle’s inside label cured the
 21 misrepresentation on its patently false “1st & Only” label, another impermissible
 22 factual argument not suitable for determination on a Rule 12(b)(6) motion.” Def.
 23 Memo. at 10. As a general rule, “whether a business practice is deceptive will
 24 usually be a question of fact” rarely appropriate for dismissal on a motion to dismiss.
 25 *Williams v. Gerber Products, Co.*, 552 F.3d 934, 938-39 (9th Cir. 2008).

26 In *Williams*, the Ninth Circuit held that a misleading representation on the
 27 front of a package is actionable even if “cured” on the back. It explained: “We
 28 disagree with the district court that reasonable consumers should be expected to look
 beyond misleading representations on the front of the box to discover the truth from

1 the ingredient list in small print on the side of the box.” *Id.* at 939-40; *Morales v.*
 2 *Kraft Foods Group, Inc.*, 14-cv-04387, at 9-10 (C.D. Cal. October 23, 2014)
 3 (Kronstadt, J.) (“Moreover, this argument has a factual basis. Thus, it relies on what
 4 a reasonable consumer would conclude about the term ‘natural,’ after reading the
 5 ingredient label on the cheese.”); *Yumul v. Smart Balance, Inc.* 773 F. Supp. 2d
 6 1117, 1129 (C.D. Cal. 2010) (“The Nucoa packaging does not make it ‘impossible
 7 for the plaintiff to prove that a reasonable consumer was likely to be deceived.”);
 8 *Wilson v. Frito-Lay North America, Inc.*, 12-1586 (Dkt. 46), 2013 WL 1320468, at
 9 *12-14 (N.D. Cal. April 1, 2013) (“Even though the nutrition box could resolve any
 10 ambiguity, the Court cannot conclude as a matter of law, in the context of a 12(b)(6)
 11 motion, that no reasonable consumer would be deceived by the ‘Made with ALL
 12 NATURAL Ingredients’ label”); .

13 Here, the “1st & Only” label attached to Good Start Gentle containers is
 14 bordered in gold and represents in bold lettering that the product reduces the risk of
 15 developing allergies generally. ¶ 44. As a matter of law, and under *Williams*, it
 16 cannot be said that no reasonable consumer would be deceived by such a
 17 misrepresentation, even if the product also includes a technical and equivocal
 18 disclaimer on the inside label. This is especially true because a reasonable consumer
 19 would be required to tear open an inside label – pre-purchase – to even be exposed
 20 to the disclaimer, something Plaintiff does not allege she did. Furthermore, it
 21 appears that the disclaimer – at best – relates to Gerber’s atopic dermatitis claim.
 22 Def. Memo. at 10. The Amended Complaint plausibly alleges that Gerber’s atopic
 23 dermatitis claim is scientifically disproven and false. ¶¶ 36-41. As such, the inside
 24 label has no curative effect and only exacerbates the deception and confusion of a
 25 reasonable consumer.

26 **3. Plaintiff Alleges Damages and “Injury in Fact” under the UCL, FAL and** 27 **CLRA**

28 Plaintiff adequately alleges damages under California law and standing under

1 Article III of the United States Constitution, despite Gerber’s argument otherwise.
 2 *See* Def. Memo. at 18-19. Litigants filing suit under the UCL and FAL must
 3 “demonstrate some form of economic injury.” *Kwikset Corp. v. The Superior Court*,
 4 51 Cal. 4th 310, 323 (Cal. 2011). Plaintiffs can allege economic injury in
 5 “innumerable” ways, including by alleging that they paid more in a transaction than
 6 they otherwise would have absent the challenged unfair business practice. *Id.*

7 In *Kwikset*, the Supreme Court of California found that plaintiffs
 8 demonstrated actionable economic harm by alleging they overpaid for or would not
 9 have purchased products falsely labeled as being manufactured in the United States.
 10 *Id.* at 329-30. Many other courts have also found injury-in-fact where the plaintiff
 11 alleged they would not have purchased a product absent misleading business
 12 practices. *See, e.g., Bruton v. Gerber Products Co.*, 961 F. Supp. 2d at 1088
 13 (“Bruton has adequately alleged injury-in-fact – namely, by claiming that she paid
 14 for products that she would not otherwise have purchased[.]”); *Stanwood v. Mary*
 15 *Kay, Inc.*, 941 F. Supp. 2d 1212, 1218 (C.D. Cal. 2012) (“The harm was not that the
 16 product was somehow inferiorly made, but simply that the consumer would not have
 17 purchased it at the price he paid, but for the misrepresentations.”); *Jones v. ConAgra*
 18 *Foods, Inc.* 912 F. Supp. 2d 889, 901 (N.D. Cal. 2012) (Allegation that “plaintiffs
 19 would not have purchased a product if the product had been labeled accurately is
 20 sufficient to establish injury under California’s consumer laws.”).

21 Gerber argues, without support, that Plaintiff must show that she paid less for
 22 competitor brand infant formulas than she did for Good Start Gentle. Def. Memo at
 23 19. As shown above, California law does not require Plaintiff to do so. Instead, all
 24 Plaintiff must allege is that she would have paid less for Good Start Gentle or not
 25 bought the product at all had Gerber not engaged in the unlawful conduct charged in
 26 the Amended Complaint, an allegation she makes numerous times, in non-
 27 conclusory fashion. ¶¶ 8, 68, 91, 102 (“Had Defendant not made false and
 28 misleading statements and used false and misleading advertising tactics, Plaintiff . . .

1 would have paid less than what [she] did for Good Start Gentle, or would not have
2 purchased the product at all.”).

3 Standing under Article III of the United States Constitution is conferred
4 though allegations of economic injury. In order to have standing under Article III, a
5 plaintiff must have suffered an injury in fact, a relatively low threshold met by a
6 “specific, identifiable trifle” of damage. *Kwikset*, 51 Cal. 4th at 322-4 (citations
7 omitted); *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 932
8 (9th Cir. 2008). Indeed, “lost money or property – economic injury – is itself a
9 classic form of injury in fact.” *Kwikset*, 51 Cal. 4th at 324; *Gerber Probiotics*, 2013
10 WL 451994, at *5 (“Plaintiffs correctly argue that ‘[m]onetary harm is a classic form
11 of injury in fact.”). Here, Plaintiff alleges that she would not have purchased “Good
12 Start Gentle had she known” about Gerber’s misleading business practices, a clear
13 economic injury, and one establishing Article III Standing.⁸ Am. Compl. at ¶ 68, 90,
14 100, 145, 154-55 (“Plaintiff . . . lost money as a direct and proximate result of
15 Defendant’s unlawful business practices.”).

16 **E. PLAINTIFF HAS PROPERLY ALLEGED A BREACH OF EXPRESS**
17 **WARRANTY CLAIM.**

18 “In order to establish an express warranty, a plaintiff must demonstrate that
19 defendant’s statements of fact or opinion were the basis of the agreement of the
20 parties.” *McKinniss v. General Mills, Inc.*, 07-cv-2521 (Dkt. 25), 2007 WL 4762172,
21 at *5 (C.D. Cal. Sept. 18, 2007); *Gerber Probiotic*, 2014 WL 1310038, at *11
22 (Under similar New Jersey law, plaintiffs pleaded a breach of express warranty
23 claim where they alleged “the terms of the contract included the promises and
24 affirmations of fact related to the Products’ purported immunity-related health
25 benefits and near-equivalence to breastmilk.”) (modifications omitted). The
26 Amended Complaint likewise alleges a statement of fact by Defendant—“Good Start
27

28 ⁸ Standing requirements under the UCL, FAL, and CLRA are identical. *Hinojos v. Kohl’s Corp.*,
718 F.3d 1098, 1108 (9th Cir. 2013.)

1 Gentle was FDA approved to reduce the risk of allergies in infants and that Good
 2 Start Gentle did in fact reduce the risk of allergies in infants.” ¶¶ 127, 44-50. The
 3 Amended Complaint further alleges “That promise and related promises became part
 4 of the basis of the bargain between the parties and thus constituted an express
 5 warranty.” ¶ 127.

6 Contrary to Defendant’s claim that “Plaintiff has not adequately plead a
 7 breach,” the Amended Complaint states “Defendant breached the express warranty
 8 in that the goods were in fact not FDA approved, did not comply with the FDA’s
 9 limited qualified health claim language requirements, and do not reduce the risk of
 10 allergies in infants.” ¶ 129. Moreover, the Amended Complaint alleges that “[a]s a
 11 result of this breach, Plaintiff and the Class in fact did not receive goods as
 12 warranted by Defendant.” *Id.*

13 Defendant next insists the Amended Complaint does not plead Plaintiff’s
 14 reliance. Def. Memo of Law at 21: 19-21. This argument disregards the paragraphs
 15 in the Amended Complaint that specifically plead reliance in considerable detail. *See*
 16 ¶ 63 (“Plaintiff first saw and relied on the information depicted [on the “1st & Only”
 17 label] in November 2013.”); ¶ 61 (“In October 2013 and November 2013, Plaintiff
 18 researched Good Start formula and reviewed statements made by Defendant on its
 19 website highlighting Good Start Gentle’s endorsement by the FDA and its ability to
 20 protect infants from developing allergies.”); ¶ 62 (“Based on this false and
 21 misleading information, Plaintiff ceased buying other infant formulas, and instead,
 22 began routinely purchasing Good Start Gentle formula.”); ¶ 67 (“Plaintiff made
 23 those purchases based on Gerber’s false and misleading promotional materials and
 24 labeling that Gerber Good Start Gentle was approved by the FDA to reduce the risk
 25 of infants developing allergies”); ¶ 72(Plaintiff “was exposed to Defendant’s
 26 deceptive advertising and business practices and purchased Good Start Gentle in
 27 reliance thereon.”); ¶¶144, 153 (“Plaintiff ... saw, believed, and reasonably relied on
 28 Defendant’s advertising, labeling and packaging when purchasing Good Start

1 Gentle.”).

2 In any event, California law does not require specific reliance to state a claim
3 for breach of express warranty. *See* CAL. COM. CODE § 2313. In *Weinstat v. Dentsply*
4 *Intern., Inc.*, 180 Cal. App. 4th 1213 (Cal. Ct. App. 2010), the Court of Appeals of
5 California stated that “breach of express warranty arises in the context of contract
6 formation in which reliance plays no role.” *Id.* at 1227. This Court has likewise held
7 that “[p]roof of reliance on specific promises or representations is not required” to
8 show that an express warranty has been breached. *In re ConAgra Foods, Inc.*, -- F.
9 Supp. 3d --, 2015 WL 102756, at *35 (C.D. Cal. Feb. 23, 2015) (collecting cases).

10 Thus, although Plaintiff has properly alleged reliance on Gerber’s
11 misrepresentations, to sustain the claim for breach of express warranty, such a
12 showing is not necessary.

13 Finally, Defendant makes the untenable claim that Plaintiff does not allege
14 “how she was damaged.” Def. Memo. of Law at 22:17. This argument totally
15 ignores the paragraphs in the Amended Complaint that allege how Plaintiff was
16 damaged by Defendant’s conduct. *See* ¶ 68 (“Plaintiff would not have purchased
17 Gerber Good Start Gentle had she known (1) that partially hydrolyzed whey protein
18 does not reduce the risk of allergies (including atopic dermatitis) in children or (2)
19 that the FDA did not endorse, approve, or certify the health claims Defendant made
20 on its labels, in its advertisements, and on its website.”); ¶ 102 (“Plaintiff and the
21 Class were denied the benefit of the bargain when they decided to purchase Good
22 Start Gentle over competitor products which are less expensive, contain healthier
23 ingredients, do not purport to be endorsed by the FDA for quality, make medically
24 and scientifically supported health claims, or which do not make health claims
25 linking the consumption of partially hydrolyzed whey protein and a reduced risk of
26 food allergies in infants. Had Defendant not engaged in its false and misleading
27 advertising tactics, Plaintiff and the Class would have paid less than what they did
28 for Good Start Gentle, or not purchased the product at all.”). In sum, Plaintiff has

1 sufficiently alleged a warranty, its breach, reliance (although not necessary under
2 California law), and damages.

3 **F. PLAINTIFF HAS PROPERLY ALLEGED A BREACH OF IMPLIED**
4 **WARRANTY CLAIM**

5 Gerber conveniently truncates the law with respect to the definition of
6 “merchantability” for purposes of pleading an implied warranty claim. Gerber
7 bizarrely posits that Plaintiff cannot prevail on the implied warranty claim because
8 there are no allegations that Plaintiff “attempted to resell her containers of Good
9 Start or that she ever intended to resell them when they [sic] purchased them.” (Def.
10 Memo., 23:25-27.). However, the law does not require these allegations for an
11 implied warranty claim.

12 Merchantability is not limited to a requirement that a product conform to its
13 ordinary and intended use. “Merchantability has several meanings [including] the
14 product must ‘conform to the promises or affirmations of fact made on the container
15 or label.’” *Hauter v. Zogarts*, 14 Cal.3d 104, 117-118 (1975) (emphasis added)
16 (implied warranty existed since product “does not live up to the statement on the
17 carton that it is ‘Completely Safe Ball Will Not Hit Player.’”); *In Re Ferrero*
18 *Litigation*, 794 F. Supp. 2d 1007, 1118 (S.D. Cal 2011) (Following *Hauter*, the court
19 declined to dismiss Plaintiffs’ claim for implied merchantability in a case involving
20 Nutella spread.); *Augustine v. Natrol Products, Inc.*, 13-cv-3219 (Dkt.), 2014 WL
21 2506284, at *5 (S.D. Cal. May 15, 2014) (“Plaintiff’s claim invokes a different
22 meaning of ‘merchantability,’ which requires that the product ‘conform to the
23 promises or affirmations of fact made on the container.’”).

24 The Amended Complaint alleges that Defendant made representations to
25 Plaintiff and the Class, “by its advertising, packaging, labeling ... that Good Start
26 Gentle was FDA approved to reduce the risk of allergies in infants and that Good
27 Start Gentle did in fact reduce the risk of allergies in infants.” ¶ 133. The Amended
28 Complaint contains additional allegations regarding Defendant’s labeling of Good

1 Start Gentle. *See, e.g.*, ¶ 62 (“Plaintiff purchased Good Start Gentle infant formula in
 2 various containers, including containers with the misleading label: ‘1st & Only
 3 Routine Formula to Reduce Risk of Developing Allergies’”); ¶ 64 (“Plaintiff also
 4 purchased Good Start Gentle misbranded containers that mischaracterized the
 5 relationship between ‘100% whey partially hydrolyzed’ and a reduced risk of atopic
 6 dermatitis”); ¶67 (“Plaintiff made those purchases based on Gerber’s false and
 7 misleading promotional materials and labeling that Gerber Good Start Gentle was
 8 approved by the FDA to reduce the risk of infants developing allergies, even though
 9 Defendant knew that such claims were baseless and rejected by the FDA.”).

10 The Amended Complaint further alleges that “Defendant breached the implied
 11 warranty of merchantability when it sold Plaintiff and the Class infant formula that
 12 ... did not conform to the promises or affirmations of fact made on the container or
 13 label.” ¶ 135.

14 Moreover, Gerber’s one sentence assertion that privity of contract is necessary
 15 for breach of an implied warranty ignores precedent, beginning with a California
 16 Supreme Court decision over seventy-five years ago, holding that an implied
 17 warranty runs to the ultimate purchaser of food products in the absence of privity.
 18 *See, e.g., Klein v. Duchess Sandwich Co.*, 14 Cal. 2d 272, 284 (1939) (“the warranty
 19 as to the fitness of foodstuffs intended for human consumption was not intended to
 20 be solely for the benefit of the immediate ‘buyer,’ but was intended to be for the
 21 benefit of the ultimate consumer,—the existence of privity of contract not being
 22 essential in an action brought by such consumer on the warranty theory”);
 23 *Gottsdanker v. Cutter Laboratories*, 182 Cal.App.2d 602, 607 (1960) (California
 24 “holds that the implied warranties run with food products to the ultimate
 25 consumer”); *Mexicali Rose v. Superior Court*, 1 Cal. 4th 617, 621 (1992) (*Klein* held
 26 that “warranty of fitness should apply to a ‘manufacturer’ of foodstuffs,
 27 notwithstanding the fact that a retailer may have sold the goods to the consumer”);
 28 *Windham at Carmel Mountain Beach Assn. v. Superior Court*, 109 Cal. App. 4th

1 1162, 1169 (2003) (“Exceptions to the privity requirement have been established in
 2 cases involving foodstuffs, drugs and pesticides”); *Baker v. Bayer Healthcare*
 3 *Pharmaceuticals, Inc.*, 13-cv-490 (Dkt. 29), 2013 WL 6698653. at *6 (N.D. Cal.
 4 Dec. 19, 2013) (“California recognizes an exception to the privity requirement in
 5 breach of warranty claims pertaining to food or drug products....This exception
 6 allows an implied warranty to run from the manufacturer to the ultimate
 7 consumer.”).

8 *Blanco v. Baxter Healthcare Corp.*, 158 Cal. App. 4th 1039 (2008),
 9 the sole case relied upon by Defendant, is easily distinguishable because
 10 (1) it was a medical device case, (2) it did not involve the recognized food
 11 exception to the privity requirement, and (3) it relied solely on *All West*
 12 *Electronics, Inc. v. M-B-W, Inc.*, 64 Cal.App.4th 717 (1998) for the
 13 proposition that “[t]he general rule is that privity of contract is required in
 14 an action for breach of ... implied warranty.” *Blanco*, 158 Cal.App.4th at
 15 1058-1059. *All West Electronics*—a case involving a concrete paver
 16 machine—held that the general rule applied “because this case does not
 17 come under any recognized exception to this general rule.” *All West*
 18 *Electronics*, 64 Cal.App.4th at 726-727. This case, however, involves
 19 foodstuffs – an infant formula.

20 Thus, under well-established precedent, Plaintiff has properly
 21 pleaded an implied warranty claim, and privity between Plaintiff and
 22 Defendant is not required.

23 **G. PLAINTIFF HAS PROPERLY ALLEGED CLAIMS FOR NEGLIGENT** 24 **AND INTENTIONAL MISREPRESENTATION**

25 Plaintiff states a claim for intentional misrepresentation because she alleges
 26 all elements with particularity. In California, the elements of intentional
 27 misrepresentation are “(1) a misrepresentation (false representation, concealment, or
 28 nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e.

1 induce reliance; (4) justifiable reliance; and (5) resulting damage.” *Cortina v. Goya*
 2 *Foods, Inc.*, 14-cv-169 (Dkt. 42), 2015 WL 1411336, at *14 (S.D. Cal. Mar. 19,
 3 2015) (Plaintiff stated claim for intentional misrepresentation where defendant
 4 omitted material fact in the sale of beverages.); *Allen v. ConAgra Food, Inc.*, 13-cv-
 5 1279 (Dkt. 41), 2013 WL 4737421, at *10 (N.D. Cal. Sept. 23, 2013) (Plaintiff
 6 adequately alleged intentional misrepresentation where defendant misrepresented
 7 that its cooking spray contained “zero fat”).

8 In this case, like *Goya Foods, Inc.*, Plaintiff states a claim for intentional
 9 misrepresentation by alleging (1) that Gerber “falsely advertised Good Start Gentle
 10 as the first only infant formula endorsed by the FDA to reduce the occurrence of
 11 allergies in infants,” ¶ 7, (2) that Gerber funded scientific research and had dealings
 12 with the FDA which gave it actual knowledge its claims were false and misleading,
 13 ¶¶ 28-29, 34-35, 36-41, (3) that despite this knowledge Gerber undertook its actions
 14 to induce purchases and outpace its competitors, ¶¶ 7, 42-52, (4) that Plaintiff
 15 justifiably relied on these falsehoods by purchasing the product after reading the
 16 product label and Gerber’s website, ¶¶ 61-69, and (5) that Plaintiff suffered
 17 damages because she “would not have purchased Good Start Gentle” had she been
 18 aware of the truth. ¶ 68.

19 Moreover, the economic loss rule does not bar Plaintiff’s claim for negligent
 20 misrepresentation because negligent misrepresentation sounds in fraud or deceit, not
 21 negligence or strict liability.⁹ *Barrier Specialty Roofing & Coatings, Inc. v. ICI*
 22 *Paint North America, Inc.*, 07-cv-1614 (Dkt. 35), 2008 WL 2724876, *5-6 (E.D.
 23 Cal. July 11, 2008). In *Barrier*, the court rejected the same argument that Gerber
 24 makes here about the economic loss doctrine but found that “negligent
 25

26
 27 ⁹ The elements of negligent misrepresentation are: “(1) misrepresentation of a past or material fact,
 28 without reasonable ground for believing it to be true, and (2) with intent to induce another’s
 reliance on the fact misrepresented: (3) ignorance of the truth and justifiable reliance on the
 misrepresentation by the party to whom it was directed; and (4) resulting damage.” *Pirozzi*, 966 F.
 Supp. 2d at 924.

misrepresentation is not subject to negligence defenses, including the economic loss rule” because “physical injury” is not a necessary element of a negligent misrepresentation claim. *Id.* Even in the case Gerber relies upon, *Williamson v. Reinalt-Thomas Corp.*, 11-cv-03548 (Dkt. 44), 2012 WL 1438812 at *13-15 (N.D. Cal. Apr. 25, 2012), the court grouped negligent misrepresentation with plaintiff’s claim for fraud (Counts 6 and 7) and only applied the economic loss rule to his claim for negligence (Count 8).

Indeed, courts have allowed similar negligent misrepresentation claims to survive a motion to dismiss. *Goya Foods, Inc.*, 2015 WL 1411336, at *14 (Plaintiff pleaded that Goya had no “reasonable ground” to believe its statements regarding its beverages were true.”); *Pirozzi v. Apple, Inc.*, 966 F. Supp. 2d 909, 924 (N.D. Cal. 2013) (sustaining negligent misrepresentation claim against Apple where the plaintiff alleged that Apple stated that customers’ private information was secure “without reasonable ground for believing it to be true.”).

Here, like *Apple* and *Goya*, Plaintiff’s claim for negligent misrepresentation is properly pleaded because she alleges facts demonstrating that Gerber’s assertion that Good Start Gentle prevented allergies was made without reasonable ground for believing it to be true, including that Gerber ignored scientific research and clear instruction from the FDA. ¶¶ 21-42, 142.

V. CONCLUSION

For the reasons discussed above, the Court should deny Gerber’s motion.

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